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Jurisdictional Conflicts Over Counterclaims Against the United States

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JURISDICTIONAL CONFLICTS OVER COUNTERCLAIMS AGAINST THE UNITED STATES

Procedural limitations on claims against the federal government pose numerous problems for private party defendants who seek to bring a counterclaim for damages against the government. Sovereign immunity arguably protects the government from counterclaims;[1] however, courts often find a waiver of immunity when the government institutes the original suit[2] or when the Tucker Act[3] is applicable. Using variations of these waiver theories, the district courts have established different upper limits on counterclaims against the government.[4] Whenever a defendant counterclaims for an amount that exceeds the upper limit established by the particular district court, potential jurisdictional conflicts between the Court of Claims and the district court arise. If the defendant seeks to bring another suit, in the Court of Claims, for the amount in excess of the counterclaim permitted he must avoid the statutory restrictions placed upon the splitting of claims.[5] Alternatively, he may seek a transfer of the entire case to the Court of Claims. Such transfers, however, are not granted automatically, and no right to a jury trial exists in that court.[6] Thus, under existing law, the extent to which the defendant may counterclaim against the government will be determined by the size of the counterclaim and the particular court in which the suit is tried, rather than by the substantive merits of the counterclaim.

This article first discusses the different approaches that courts have used in determining district court jurisdiction over counterclaims and the differing limits that are imposed upon the size of the counterclaim. Second, it examines the relationship between the Court of Claims and the district courts in cases where the defendant cannot counterclaim for full relief in a district court. The article concludes with several legislative proposals that could lessen the uncertainty and lack of uniformity among the courts currently facing a defendant who wants to counterclaim against the government.

I. District Court Jurisdiction

The doctrine of sovereign immunity provides that courts do not have jurisdiction over a claim against the United States government by one of

[1] *See* notes 7-14 and accompanying text *infra*.
[2] *See* notes 15-28 and accompanying text *infra*.
[3] *See* notes 33-47 and accompanying text *infra*.
[4] *See* notes 48-52 and accompanying text *infra*.
[5] *See* notes 56-57 and accompanying text *infra*.
[6] *See* notes 67-77 and accompanying text *infra*.

its citizens unless the government waives its immunity and consents to the suit.[7] The doctrine was first mentioned in *Cohens v. Virginia*[8] by Chief Justice Marshall, and in *United States v. Lee*,[9] the Supreme Court noted that it had repeatedly accepted the firmly entrenched doctrine without discussion or analysis.[10] There is no statutory basis for the doctrine, and the reasons generally given for it have been discredited by modern commentary.[11] Recognizing the insubstantial legal basis of the doctrine, modern courts have often limited the preclusive effect of sovereign immunity.[12] Nonetheless, some modern judicial decisions still rely upon the doctrine to deny jurisdiction.[13] Therefore, the doctrine still presents a problem for a potential counterclaimant, because a counterclaim, like an original suit, is subject to the bar of sovereign immunity, unless there is a waiver of the immunity.[14]

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[7] *See, e.g.*, United States v. Sherwood, 312 U.S. 584 (1941); Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939), Minnesota v. United States, 305 U.S. 382 (1939); Kansas v. United States, 204 U.S. 331 (1907); United States v. Lee, 106 U.S. 196 (1882); United States v. Thompson, 98 U.S. 486 (1878); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

[8] 19 U.S. (6 Wheat.) 264, 380 (1821).

[9] 106 U.S. 196 (1882).

[10] The Court stated that,

> while the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since . . . been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.

Id. at 207.

[11] *See* Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387 (1970), where the author stated:

> At various times it has been stated that the basis of the doctrine is, *first*, the traditional immunity of the English sovereign surviving by implication the constitutional grant of judicial power over "Controversies to which the United States shall be a party"; *second*, the inability of the courts to enforce a judgment against the federal executive without its aid; and, *third*, the "logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." These conceptual arguments for sovereign immunity are now totally discredited. The only rationale for the doctrine that is now regarded as respectable by courts and commentators alike is that official actions of the Government must be protected from undue judicial interference. (emphasis in original, footnotes omitted)

Id. at 396-97.

[12] *See, e.g.*, National City Bank v. Republic of China, 348 U.S. 356 (1955); United States v. Yellow Cab Co., 340 U.S. 543 (1951); Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939). In *Yellow Cab*, the Court refused to apply sovereign immunity to cross-claims against the government under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1970), although the statute only provided for a waiver of immunity for claims and did not mention cross-claims.

[13] *See, e.g.*, United States v. Testan, 424 U.S. 392 (1975); Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972); International Eng'r. Co. v. Richardson, 512 F.2d 573 (D.C.Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976); United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976).

[14] *See, e.g.*, United States v. Shaw, 309 U.S. 495 (1940); Nassau Smelting & Refining Works, Ltd. v. United States, 266 U.S. 101 (1924); Danning v. United States, 259 F.2d 305 (9th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959); United States v. Wissahickon Tool Works, Inc., 200 F.2d 936 (2d Cir. 1952). *Nassau Smelting* held that "[t]he objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it." 266 U.S. at 106.

A. Implied Waiver of Sovereign Immunity

It is now generally accepted that when the government initiates a suit, the defendant has a right to complete recoupment[15] of his damages, because the government waives its sovereign immunity to the extent of its claim by bringing the action.[16] In *Bull v. United States,*[17] the Court recognized that a defendant has a right of recoupment in a suit instituted by the government.[18] In *United States v. Martin,*[19] a declaratory action was brought by the United States to determine the rights of parties affected by a federal water diversion project. Neighboring ranchers intervened and were permitted recoupment. The court stated that "when the United States institutes a suit, it thereby consents by implication to the full and complete adjudication of all matters and issues which are reasonably incident thereto."[20]

Courts generally permit a party sued by the government to set-off[21] any claims that the party has against the government.[22] It is required by 28 U.S.C. § 2406 that such claims must first be presented to and denied by the General Accounting Office.[23] Although the statute appears only to outline procedural requirements for set-offs, the Supreme Court, in *United States v. Wilkins,*[24] held that the statute acts as a waiver of

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[15] Recoupment and set-off can be used to offset the amount of the government's claim but cannot be used as a means of getting affirmative relief. A recoupment claim must be based on the transaction sued upon by the plaintiff and historically has been justified as a means of avoiding multiple suits on a single controversy between the parties. A set-off claim permits the presentation of valid claims based on different transactions that involve the same parties. The set-off or recoupment claim must seek the same type of relief sought by the original suit. *See, e.g.,* Frederick v. United States, 386 F.2d 481 (5th Cir. 1967); *In re* Greenstreet, Inc., 209 F.2d 660 (7th Cir. 1954); United States v. Ameco Electronic Corp., 224 F. Supp. 783 (E.D.N.Y. 1963). For a more extended discussion of recoupment and set-off and their effect on modern counterclaims, *see generally,* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 10.14-.16 (2d ed. 1977).

[16] *See, e.g.,* Bull v. United States, 295 U.S. 247 (1935); United States v. Agnew, 423 F.2d 513 (9th Cir. 1970); United States v. Martin, 267 F.2d 764 (10th Cir. 1959); United States v. Gregory Park, 373 F. Supp. 317 (D.N.J. 1974); United States v. Taylor, 342 F. Supp. 715 (D. Kan. 1972).

[17] 295 U.S. 247, 261-62 (1935).

[18] The Court actually stated that the recoupment claim was valid and merely addressed the question of whether the statute of limitations was applicable.

[19] 267 F.2d 764 (10th Cir. 1959).

[20] *Id.* at 769. *See also* United States v. Timber Access Indus. Co., 54 F.R.D. 36 (D. Ore. 1971), where the government conceded that defendant had a right of recoupment not in excess of the government's claim.

[21] *See* note 15 *supra.*

[22] *See, e.g.,* United States v. Shaw, 309 U.S. 495 (1940); United States v. Wilkins, 19 U.S. (6 Wheat.) 135 (1821); United States v. Agnew, 423 F.2d 513 (9th Cir. 1970); *In re* Greenstreet, Inc., 209 F.2d 660 (7th Cir. 1954); United States v. Boris, 122 F. Supp. 936 (E.D. Pa. 1954); United States v. Stephanidis, 41 F.2d 958 (E.D.N.Y. 1930), *aff'd,* 47 F.2d 554 (2d Cir. 1931).

[23] 28 U.S.C. § 2406 (1970) provides:

> In an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the General Accounting Office, or that he has, at the time of the trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the General Accounting Office by absence from the United States or unavoidable accident.

[24] 19 U.S. (6 Wheat.) 135 (1821).

sovereign immunity for set-offs when the government initiates a suit.[25] The Court reasoned that the statute did not specify any types of claims for credit which would not be allowed. Since the purpose appeared to be the settlement of all accounts in a single suit, the Court construed the statute to permit all set-off claims.[26]

Arguably, the implied waiver theory supports complete waiver of immunity whenever the government institutes a suit. In *United States v. Shaw*,[27] however, the Supreme Court refused to find that the institution of a suit constituted a complete waiver of sovereign immunity. In *Shaw*, the government sued the estate of Shaw for damages due to conversion of certain properties left with Shaw as bailee. The estate counterclaimed for damages on a subcontract for which a government corporation had agreed to assume responsibility. The state supreme court upheld both claims, but the Supreme Court reversed with regard to the counterclaim. The Court reasoned that although the waiver of sovereign immunity can be extended by legislation, "[i]t is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress. . . . Against the background of complete immunity we find no Congressional action modifying the immunity rule in favor of cross-actions beyond the amount necessary as a set-off."[28]

B. Express Waiver of Sovereign Immunity

The government may expressly waive its immunity by statute.[29] The Court of Claims Act of 1855,[30] the applicable part of which is now 28

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[25] *Accord,* Watkins v. United States, 76 U.S. (9 Wall.) 759 (1870); United States v. Buchanan, 49 U.S. (8 How.) 83 (1850); United States v. Bank of Metropolis, 40 U.S. (15 Pet.) 377 (1841); United States v. Ringgold, 33 U.S. (8 Pet.) 150 (1834).

[26] The Court stated:

> There being no limitation as to the nature and origin of the claim for a credit which may be set up in the suit, we think it a reasonable construction of the act, that it is intended to allow the defendant the full benefit at the trial of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States. The object of the act seems to be to liquidate and adjust all accounts between the parties, and to require a judgment for such sum only, as the defendant in equity and justice should be proved to owe to the United States.

19 U.S. (6 Wheat.) at 144. Given this authority, recent cases involving the interpretation of § 2406 have been concerned only with the procedure of presenting the set-off claim. *See, e.g.*, United States v. Frank, 207 F. Supp. 216 (S.D.N.Y. 1962); United States v. Boris, 122 F. Supp. 936 (E.D. Pa. 1954). *But see* Frederick v. United States, 386 F.2d 481 (5th Cir. 1967), where the court said § 2406 had no effect when the sovereign had waived its immunity by filing suit.

[27] 309 U.S. 495 (1940).

[28] *Id.* at 502. *But see* United States v. Finn, 127 F. Supp. 158 (S.D. Cal. 1954), *modified*, 239 F.2d 679 (9th Cir. 1956), where the district court held that the *Shaw* decision did not apply where the controversy concerned the possession of property seized by the government instead of monetary damages.

[29] For example, the government has recognized its ability to waive sovereign immunity in FED. R. CIV. P. 13(d), which states: "These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof." *Cf.* United States v. Sherwood, 312 U.S. 584 (1941), where the Court held that the district court could not use certain procedural rules dealing with third party defendants to expand its jurisdiction.

[30] 10 Stat. 612 (1855).

U.S.C. § 1491,[31] created the Court of Claims, and granted it jurisdiction to hear certain specified claims against the federal government. Prior to its enactment, Congress had to respond directly to each claim presented against the government. The Court of Claims relieved Congress of this burden.[32]

The Tucker Act of 1887,[33] the applicable part of which is now 28 U.S.C. § 1346(a), (c),[34] granted the district courts original jurisdiction, concurrent with the Court of Claims, over certain actions or claims against the government that do not exceed $10,000. Since the statute refers only to civil actions or claims, courts have differed concerning district courts jurisdiction over counterclaims filed in response to government-instituted suits.

The original view, currently the minority position, applied only to original suits and does not grant the district courts jurisdiction over counterclaims against the government.[35] The leading case supporting this view is *United States v. Nipissing Mines Co.*,[36] which involved a suit by the government to recover assessed taxes and a counterclaim for other taxes erroneously paid and not returned by the government. The Second Circuit relied upon the literal language of the Act in finding that "the Tucker Act of 1887 . . . is not broad enough to permit the recovery of demands upon counterclaims. We think that that statute refers to original suits and prescribes procedure inconsistent with its use as the basis of a

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[31] 28 U.S.C. § 1491 (1970) provides in part:

> The court of claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

[32] *See generally* Shea, *Statutory Jurisdiction of the Court of Claims: Past, Present and Future*, 29 FED. B. J. 157 (1970).

[33] 24 Stat. 505 (1887). The Tucker Act also incorporated the Court of Claims Act cited in note 30, *supra*.

[34] 28 U.S.C. § 1346 (1970) provides:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
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> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . .
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> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
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> . . . .
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> (c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section

[35] *See, e.g.*, United States v. Nipissing Mines Co., 206 F. 431 (2d Cir. 1913), *appeal dismissed*, 234 U.S. 765 (1914); United States v. Thurber, 376 F. Supp. 670 (D. Vt. 1974); United States v. Ameco Electronic Corp., 224 F. Supp. 783 (E.D.N.Y. 1963); United States v. Carey Terminal Corp., 209 F. Supp. 385 (E.D.N.Y. 1962); United States v. Wissahickon Tool Works, Inc., 84 F. Supp. 902 (S.D.N.Y. 1949), *aff'd*, 200 F.2d 936 (2d Cir. 1952).

[36] 206 F. 431 (2d Cir. 1913), *appeal dismissed*, 234 U.S. 765 (1914).

counterclaim."[37] *United States v. Wissahickon Tool Works, Inc.*,[38] provides a further rationale for this original view. In holding that counterclaims could not be filed under the Tucker Act, the *Wissahickon* court stressed that the Tucker Act expressly provides for counterclaims by the government in section 1346(c)[39] and presumed that the omission by the drafters of a similar provision for private party counterclaims was intentional.[40] Although the Second Circuit continues to employ the original view,[41] several district courts of the Second Circuit, noting that most other jurisdictions have rejected this rule, have called for a reexamination of the question by the circuit court.[42]

The modern majority view is that the Tucker Act applies to counterclaims as well as to original suits against the government.[43] The principal case so holding is *United States v. Silverton*,[44] in which the government sued for the balance of the purchase price of scrap webbing, and the defendant counterclaimed for damages due to defects in the goods. The First Circuit held that the Tucker Act permitted the defendants to bring a counterclaim against the government where the facts establishing the counterclaim would have permitted the defendant to bring an original suit against the government in the district court. In *United States v. Springfield*,[45] the court noted that if the counterclaim is required to be brought as a separate suit, it can still be consolidated with the original suit, and that such wasteful litigation should be avoided.[46] Furthermore, in *United States v. Rudis*,[47] the court observed that if the Tucker Act was meant to apply only to original suits, the statute need not have referred to both civil actions and claims, because a reference to civil actions alone would have included all original suits.

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[37] *Id.* at 434. There is no legislative history on this point.

[38] 84 F. Supp. 902 (S.D.N.Y. 1949), *aff'd*, 200 F.2d 936 (2d Cir. 1952).

[39] *See* note 34 *supra*.

[40] *Accord*, United States v. Double Bend Mfg. Co., 114 F. Supp. 750 (S.D.N.Y. 1953). Note, however, that government counterclaims would never qualify under § 1346 (2), while private counterclaims might.

[41] Despite their adherence to this original view, the courts of the Second Circuit still recognize a defendant's right to recoupment and set-off. *See, e.g.*, United States v. Thurber, 376 F. Supp. 670 (D. Vt. 1974); United States v. Carey Terminal Corp., 209 F. Supp. 385 (E.D.N.Y. 1962).

[42] *See, e.g.*, United States v. Ameco Electronics Corp., 224 F. Supp. 783, 785 (E.D.N.Y. 1963); United States v. Frank, 207 F. Supp. 216, 220 n.4 (S.D.N.Y. 1962).

[43] *See, e.g.*, United States v. Bursey, 515 F.2d 1228 (5th Cir. 1975); United States v. Springfield, 276 F.2d 798 (5th Cir. 1960); Thompson v. United States, 250 F.2d 43 (4th Cir. 1957); United States v. Silverton, 200 F.2d 824 (1st Cir. 1952); United States v. Holder, 292 F. Supp 826 (S.D. Iowa 1968); United States v. Rudis, 178 F. Supp 864 (N.D. Ill. 1959); United States v. King, 119 F. Supp. 398 (D. Alas. 1954).

[44] 200 F.2d 824 (1st Cir. 1952).

[45] 276 F.2d 798 (5th Cir. 1960).

[46] The court stated:

> We think the statute should be interpreted from a practical rather than technical standpoint. Nothing in the statute itself precludes such an interpretation. And in a situation where no substantive rights are at stake, the only question being whether litigation is going to be disposed of in an expeditious or inexpeditious manner, we think that an interpretation which lends itself to sound judicial administration is justified.

276 F.2d at 804.

[47] 178 F. Supp. 864 (N.D. Ill. 1959).

Courts adopting the modern majority position have differed over whether the Tucker Act supplements, displaces, or provides an alternative to the theories of recoupment and set-off.[48] Such an interpretation denies the district courts jurisdiction over a valid counterclaim in excess of $10,000 when the defendant could otherwise recoup or set-off a claim regardless of the amount.

Many courts have used an either-or approach in relating the Tucker Act to the rights of recoupment and set-off.[49] These decisions recognize that the Tucker Act applies to counterclaims but hold that a defendant can use recoupment or set-off instead of relying on the Tucker Act. Other modern courts have extended this either-or approach and have held that there is a full right to recoupment or set-off in addition to a right to counterclaim for up to $10,000 under the Tucker Act.[50] In short, these courts hold that the Tucker Act places a $10,000 limit on the affirmative relief that can be sought by counterclaim without affecting a right to recoupment or set-off. For example, in *United States v. Summ*,[51] the court found a right to recoupment equal to the government's original claim plus a right to $10,000 affirmative recovery under the Tucker Act. The virtue of this approach is that it places the same limit on affirmative relief recoverable by counterclaim that would apply to a suit originally filed by a private party against the government in district court.[52]

II. COURT OF CLAIMS JURISDICTION

Under any interpretation of the Tucker Act, some counterclaims will exceed the jurisdictional dollar limit of the district court. This will happen at least whenever the counterclaim exceeds the government's claim by more than $10,000.[53] Accordingly, a defendant must either institute a new suit in the Court of Claims to recover the remainder of his claim[54] or seek a transfer of the original suit to the Court of Claims so that his entire counterclaim can be presented in one suit.[55]

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[48] *See, e.g.*, North Dakota-Montana Wheat Growers Ass'n. v. United States, 66 F.2d 573 (8th Cir. 1933), *cert. denied*, 291 U.S. 672 (1934); United States v. United States Tin Corp., 148 F. Supp 922 (D. Alas. 1957).

[49] *See, e.g.*, Lowell O. West Lumber Sales v. United States, 270 F.2d 12 (9th Cir. 1959); United States v. Gregory Park, Section II, Inc., 373 F. Supp. 317 (D.N.J. 1974); United States v. Zashin, 160 F. Supp. 843 (E.D.N.Y. 1958).

[50] *See, e.g.*, United States v. Timber Access Indus. Co., 54 F.R.D. 36 (D. Ore. 1971); United States v. Summ, 282 F. Supp. 628 (D.N.J. 1968); United States v. Buffalo Coal Mining Co., 170 F. Supp. 727 (D. Alas. 1959), *modified*, 343 F.2d 561 (9th Cir. 1965); United States v. Petaschnick, 143 F. Supp 206 (E.D. Wis. 1956).

[51] 282 F. Supp. 628 (D.N.J. 1968).

[52] *But see* United States v. Petaschnick, 143 F. Supp. 206 (E.D. Wis. 1956), where multiple counterclaims were permitted after set-off, since each additional counterclaim was under $10,000.

[53] *See* notes 48-52 and accompanying text *supra*.

[54] *See* notes 56-66 and accompanying text *infra*.

[55] *See* notes 67-77 and accompanying text *infra*.

A. Pending Claims

Under 28 U.S.C. § 1500,[56] the Court of Claims lacks jurisdiction over any claim that is pending in another court. Enacted after the Civil War, this provision addressed the problem of damage claims being presented against an agent of the government in district court and also against the government in the Court of Claims if the other suit failed.[57] Although enacted before the Tucker Act's extension of district court jurisdiction, section 1500 has been applied to Tucker Act claims, but its specific applicability to Tucker Act counterclaims has never been considered by the Court of Claims.[58] In *Wessel, Duval & Co. v. United States*,[59] the plaintiff filed the same suit in both the district court and the Court of Claims, because he was uncertain which court had jurisdiction and did not want to risk an expiration of the statute of limitations.[60] The Court of Claims noted that the plaintiff was not attempting to present the same claim twice but held that the strict language of section 1500 prevented the maintenance of the suit in the Court of Claims.[61]

In other cases, the Court of Claims has read section 1500 liberally to avoid harsh results. In *Tecon Engineers, Inc. v. United States*,[62] the district court suit was filed after a suit had been instituted in the Court of Claims. The Court of Claims retained jurisdiction, reasoning that a contrary result would mean that divestiture of its jurisdiction and delay of the litigation could be obtained merely by a later filing in district court. It further noted that language had been deleted from the proposed version of section 1500 that would have divested the Court of Claims of jurisdiction under these circumstances.[63] Courts generally avoid a strict application of section 1500 when the private party is unable to obtain full relief on the

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[56] 28 U.S.C. § 1500 (1970) provides:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

[57] At the time, this problem could not be prevented by the doctrines of res judicata and collateral estoppel. *See* Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 GEO. L.J. 573, 574-80 (1967).

[58] However, several district courts have stated that the portion of a counterclaim which is too large to bring in district court can be brought as a separate suit before the Court of Claims. *See, e.g.*, United States v. Timber Access Indus. Co., 54 F.R.D. 36 (D. Ore. 1971); United States v. Buffalo Coal Mining Co., 170 F. Supp. 727 (D. Alas. 1959).

[59] 124 F. Supp. 636 (Ct. Cl. 1954).

[60] *Id.* at 637. Plaintiff was not sure whether the suit should be brought under the Tucker Act, the Public Vessels Act, 46 U.S.C. § 781 (1970), or the Suits in Admiralty Act, 46 U.S.C. § 741 (1970). Pertinent parts of the latter two Acts have not been changed since the case was decided.

[61] 124 F. Supp. at 637-38. *Accord*, National Cored Forgings Co. v. United States, 132 F. Supp. 454 (Ct. Cl. 1955). *But cf.*, Oakland Truck Sales Inc., v. United States, 149 F. Supp. 902 (Ct. Cl. 1957) where the court maintained jurisdiction when the other suit was filed in the court of a foreign country.

[62] 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966).

[63] *Id.* at 947. The words "or shall commence and have pending" followed the words "have commenced and has pending" in the proposed version.

claim in one court.[64] For example, in *Casman v. United States*,[65] the plaintiff brought a suit in the Court of Claims for back pay and another suit in district court seeking reinstatement to the civil service job from which he had been discharged. The Court of Claims noted that the plaintiff was entitled to both types of relief and was forced to bring two suits, since neither court could grant full relief.[66] Hence, it held that section 1500 did not prevent the suit for back pay. The *Casman* rationale is equally applicable to counterclaims in excess of the district courts' jurisdictional limits. If a private party cannot counterclaim for full relief in district court, then he must bring another suit in the Court of Claims to obtain full relief. Since neither court is prepared to grant the full relief on his claim against the government, the plaintiff should be permitted to bring two suits seeking the total relief to which he is entitled.

B. Transferred Claims

As an alternative to instituting a separate suit in the Court of Claims, the defendant may request a transfer of the entire case to the Court of Claims under 28 U.S.C. § 1406(c),[67] so that he can counterclaim for full relief in one suit.[68] If a court refuses to transfer a case the defendant must bring a separate suit in the Court of Claims or abandon the remainder of his claim.[69]

Only cases within the exclusive jurisdiction of the Court of Claims are subject to transfer; however, the courts have not considered this requirement. The courts dealing with section 1406 transfers have evidently presumed that once a counterclaim against the government has been filed the case is within such exclusive jurisdiction. The only significant requirement that the district courts have applied is that the transfer must be in the best interests of justice. The courts have enumerated several factors in deciding whether this requirement has been satisfied: the statute of limitations, the convenience of the parties and witnesses, and the efficient administration of justice.[70] No cases have found a denial of a

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[64] *See, e.g.*, Camero v. United States, 345 F.2d 798 (Ct. Cl. 1965); Casman v. United States, 135 Ct. Cl. 647 (1956); Pacific Mills v. United States, 3 F. Supp. 541 (Ct. Cl. 1933).

[65] 135 Ct. Cl. 647 (1956).

[66] *Cf.*, Meyer v. United States, 150 F. Supp. 314 (Ct. Cl. 1957), where plaintiff was permitted to bring a claim for rent against the government in the Court of Claims while contesting the government's condemnation proceeding on the leasehold in the district court. The Court of Claims held that section 1500 did not apply since the plaintiff had initiated only one suit, although he was involved in two suits.

[67] 28 U.S.C. § 1406 provides:

> (c) If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court.

[68] Either party may request a transfer. Under the literal terms of § 1406(c), it appears that the court can transfer on its own motion; however, no cases have presented this question.

[69] In some cases the running of the statute of limitations might bar a second suit.

[70] *See* Eccles v. United States, 396 F. Supp. 792 (D.N.D. 1975). *See also* Love v. Taylor, 415 F.2d 1118 (6th Cir. 1969), *cert. denied*, 397 U.S. 1023 (1970); Johnson v. Helicopter & Airplane Services Corp., 389 F. Supp. 509 (D. Md. 1974), as examples of transfers under § 1406 to courts other than the Court of Claims.

request to transfer to be unwarranted.[71]

One reason for denying transfer might be the hardship on the party not seeking the transfer. A transfer upon the defendant's timely request[72] probably imposes no hardship on the government, since the Court of Claims is located in Washington, D.C. The defendant, however, may not wish to transfer the case to the Court of Claims.

The possible inconvenience of litigating in Washington may deter a defendant from seeking a transfer to the Court of Claims. A potential problem that a defendant faces if a transfer is granted is that there is no right to trial by jury before the Court of Claims.[73] The defendant has a right to trial by jury on government claims in suits initiated by the government in district courts.[74] If the defendant counterclaims and the case is transferred to the Court of Claims, he will lose this right to trial by jury. *Frantz Equipment Co. v. United States*[75] suggests a possible way in which the government's use of procedural rules eliminates a defendant's right to a jury trial on a government instituted suit if the defendant insists on seeking complete relief. In *Frantz*, the plaintiff brought a suit in the Court of Claims and the government counterclaimed. The governmental counterclaim had been filed earlier as an original suit in district court against plaintiff's predecessor company. The Court of Claims held that "the plaintiff, by instituting suit in this court, impliedly consented, as a condition to such right to sue the United States, that any counterclaim interposed by the United States should be heard and determined by this court without the intervention of a jury,"[76] even though there would have been a jury trial if the government had pressed its claim in the district court. Using the court's reasoning, if a defendant counterclaims against the government for the maximum relief available in district court and then sues in the Court of Claims for the remainder of his claim, the defendant loses his right to a jury trial on the government's claim if the government obtains a section 1406 transfer. Although such a use of procedural rules could be unfair, judicial discussions of the section 1406 criteria of the interests of justice have not considered the right to trial by jury.[77] Arguably, the interests of justice should not require or permit a suit instituted by the government to be transferred over the objections of the defendant where a right to a trial by jury may be lost as a consequence of the transfer.

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[71] *Cf.*, United States v. Northern Colorado Water Conservancy Dist., 449 F.2d 1 (10th Cir. 1971), where a transfer was denied due to an unexplained delay of nine years before the transfer request was filed.

[72] The period during which a transfer request should be considered timely might logically be made equal to the period during which an original suit could be filed in the Court of Claims without being barred by the statute of limitations.

[73] *See, e.g.*, Galloway v. United States, 319 U.S. 372 (1943); United States v. Sherwood, 312 U.S. 584 (1941); McElrath v. United States, 102 U.S. 426 (1880).

[74] *See* 28 U.S.C. § 2402 (1970) which specifically precludes a jury trial in district court for a claim brought by a private party under section 1346.

[75] 105 F. Supp. 490 (Ct. Cl. 1952).

[76] *Id.* at 496.

[77] *See* note 70 and accompanying text *supra* for a discussion of factors that are considered.

III. LEGISLATIVE CHANGE

Inconsistent interpretations of the above statutes have created uncertainty and a lack of uniformity in their application. Depending upon the constructions given by a district court, a defendant's counterclaim may be limited to recoupment or set-off up to the amount of the government's claim,[78] to a maximum of $10,000 under the Tucker Act,[79] to full recoupment or set-off even where the $10,000 Tucker Act limit would ordinarily apply,[80] or to full recoupment or set-off plus up to $10,000 in affirmative relief under the Tucker Act.[81] If the counterclaim exceeds the limit, the defendant who wants full recovery must either bring a separate suit for additional relief in the Court of Claims[82] or seek a transfer of the entire case to the Court of Claims.[83]

Much of this uncertainty and unequal treatment can be eliminated by minor changes in the relevant statutes. The uncertainty concerning the jurisdiction of the district courts over counterclaims could be eliminated by amending section 1346(a) to allow claims not exceeding $10,000 in "affirmative relief", instead of referring to $10,000 in "amount". Such an amendment would adopt the view of more modern decisions that district court jurisdiction is limited to counterclaims requesting no more than $10,000 in addition to recoupment or set-off.[84] A statutory amendment adopting this view would be consistent with the purpose of the Tucker Act to create, rather than eliminates district court jurisdiction over claims against the government.

Court decisions have indicated that section 1500 will not act as a bar to a separate suit filed in the Court of Claims for the remainder of one's claim while the original suit and permitted counterclaim are pending in district court.[85] However, since the Court of Claims has never ruled on this specific issue,[86] changes in section 1500 to refer to a "claim for relief" rather than to a "claim" and to "suit or process for the same relief" rather than to "suit or process" would eliminate the problem.[87] Such a change would still prevent duplicative litigation without also precluding a party from seeking full relief. One commentator has suggested that the extended use of res judicata should completely replace section 1500.[88] While this would adequately prevent anyone from suc-

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[78] *See* notes 15-26, 41, and accompanying text *supra*.
[79] *See* note 48 and accompanying text *supra*.
[80] *See* notes 49 and accompanying text *supra*.
[81] *See* notes 50-52 and accompanying text *supra*.
[82] *See* notes 56-66 and accompanying text *supra*.
[83] *See* notes 67-77 and accompanying text *supra*.
[84] *See* notes 50-52 and accompanying text *supra*.
[85] *See* notes 56-66 and accompanying text *supra*.
[86] *See* note 58 and accompanying text *supra*.
[87] Although these changes would not prevent misinterpretation by a determined court, they are an attempt at reaching the desired result through a minimum of modification. An alternative would be simply to add a sentence exempting claims split due to § 1346(a) from the scope of § 1500.
[88] *See* Schwartz, *supra* note 57, at 599-601.

cessfully maintaining two suits for the same relief to judgment, it would not avoid the administrative costs of wasteful litigation that could accrue if two suits were brought and maintained until judgment was reached in one of them.

The problem concerning transfer can also be lessened by statutory change. The possibility of depriving the defendant of the right to a jury trial can be removed by amending section 1406 to prevent the government from requesting a transfer,[89] thereby limiting it to its original choice of forum. Additionally, providing for an automatic transfer upon a timely request by the defendant will prevent judicial refusals of proper transfer without harming the government.[90] On the other hand, including the right to a jury trial as one of the factors to be considered before transfer would not provide effective protection, because the court could give the right to a jury trial relatively little weight in determining whether a transfer is in the interests of justice.

IV. CONCLUSION

A litigant who wishes to pursue a counterclaim against the government is in a difficult and uncertain position. By instituting the action, the government has waived its immunity to an uncertain extent. Depending upon the court and the size of the counterclaim, the defendant may have to litigate two suits or transfer the case to the Court of Claims in order to seek complete relief. Legislative change can reduce the difficulties of counterclaiming against the government and eliminate the existing lack of uniformity in the treatment of these counterclaims by federal courts. Section 1346 can be amended to provide a uniform rule for determining the permissible size of counterclaims. Amendment of section 1500 can permit a second suit to be brought in the Court of Claims if the counterclaim exceeds the jurisdictional limits of the district court, thus permitting full recovery. Protection of the defendant's decision concerning the relative merits of a trial by jury and the consolidation of his claim in the Court of Claims can be attained through amendment of section 1406. While the complete removal of dollar limits on jurisdiction of the district courts would solve all of the problems discussed, the fading doctrine of sovereign immunity still possesses too much vitality for such a proposal to receive serious consideration.

—David G. Swenson

[89] *See* notes 67-72 and accompanying text *supra*.
[90] *See* notes 73-77 and accompanying text *supra*.